

## A Primer On Temporary Foreign Workers Part 1: Mastering The Labour Market Opinion Application

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Canada is currently experiencing an unprecedented period of change in its labour force. Simply put, Canada needs more foreign workers and more mobility across borders. Why you ask? The reasons are many: an increased need to find specialized knowledge and skill abroad, more mergers and acquisitions, expansion in offshore manufacturing and production, and the need to fill shortages in Canada's dwindling labour supply. The list goes on.

Given the recent amendments to the *Immigration and Refugee Protection Act* ("the Act") through Bill C-50 and the introduction of new government programs, there is no better time to learn about the ins and outs of temporary foreign worker applications. Bill C-50 has given the government more control over determining which types of immigrants can work and live in Canada. Particular programs that identify specific occupations for which there are identified labour shortages will impact the way in which temporary foreign worker applications are approached.

With all of this in mind we have created a 4 part series on temporary foreign workers,

which is geared to the needs of HR managers. The series will cover the basics on what you need to know to get foreign workers across the border in a timely manner while complying with the Act and its Regulations.

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**Part 1:** *Mastering the Labour Market Opinion Application* will provide insight into Service Canada's approval requirements and valuable tips to make your Labour Market Opinion ("LMO") application the best it can be.

**Part 2:** *Successful Strategies For Acquiring a Work Permit* offers advice on completing a work permit application and key strategies for

preparing your workers for questions at the point of entry.

**Part 3:** *What You Need to Know About Medical and Criminal Inadmissibility* provides a thorough analysis of how to deal with these two key admissibility issues and;

**Part 4:** *After Arrival: The Nuts and Bolts of Integrating Your Temporary Foreign Worker* reviews the steps HR managers should take to facilitate the speedy integration of temporary workers into Canadian society and reviews the basic components of an immigration policy.

### **What Is A Labour Market Opinion?**

In order to hire a foreign worker, an employer must generally obtain a positive LMO unless there is an available exemption. The LMO, which is sometimes referred to as an "employment confirmation", is provided by Service Canada (a branch of the Department of Human Resources and Social Development Canada (HRSDC)). Its main purpose is to determine whether or not a job offer is authentic and the likely impact the job will have on the Canadian labour market.

The employer has the onus of establishing, through the LMO application, that either 1) the purpose of hiring is to fill a labour shortage in the area for which workers are being hired, or 2) a societal benefit can be obtained by hiring outside Canada. The first category (labour shortage) is the most often used. Applications under the second category (significant benefit) rarely succeed. Under the significant benefit category you must provide proof that through your hire there will be direct employment creation (i.e. that hiring a single worker or multiple workers will lead to the creation of more jobs in the Canadian labour market). This is often very difficult to establish. Labour shortage is thus the preferable approach. Applying for an LMO is the first step in a two-step immigration process, the first step being the receipt of a positive LMO, the second step being the acquisition of a work permit. Where one is required, a positive LMO must be obtained

before the prospective worker can apply for a work permit.

Your approach to the LMO will depend on the skill level of the occupation for which you are hiring and/or any specific programs that your applicant may fall under. HRSDC uses the *National Occupations Classification (NOC)* to classify job offers for the purpose of supplying LMOs. The NOC contains the following skill levels:

- Skill Level 0 - Management occupations
- Skill Level A - Occupations usually requiring a university education
- Skill Level B - Occupations usually requiring college education or apprenticeship training
- Skill Level C - Occupations usually requiring secondary school and/or occupation specific training
- Skill Level D - On-the-job training is usually provided for occupations under this level.<sup>1</sup>

The LMO application will vary depending on whether you are hiring a skilled worker (levels 0,A, and B) or a low-skilled worker (levels C and D). A brief description of these two categories and their LMO requirements are set out below:

### **The Skilled Worker (Skill Levels 0,A and B)**

A skilled worker is a worker in a management, professional, or technical occupation. These positions can range from chefs to doctors to senior managers and executives. The educational and technical requirements vary according to the specific occupation as classified under the NOC system.

Service Canada will assess a skilled worker application for an LMO according to the following factors, which are also identified in

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<sup>1</sup> *National Occupational Classification Matrix, 2006*, Human Resources and Social Development Canada. Available online: <[http://www5.hrsdc.gc.ca/NOC-CNP/docs/Matrix\\_Poster\\_English.pdf](http://www5.hrsdc.gc.ca/NOC-CNP/docs/Matrix_Poster_English.pdf)> (Accessed August 21, 2008).

section 203(3) of the *Immigration and Refugee Protection Regulations* ("the Regulations"):

- (a) Whether the employment of the foreign worker is likely to result in direct job creation or job retention for Canadian citizens or permanent residents;
- (b) Whether the employment of the foreign worker is likely to result in the creation or transfer of skills and knowledge for the benefit of Canadian citizens or permanent residents;
- (c) Whether the employment of the foreign worker is likely to fill a labour shortage;
- (d) Whether the wages offered to the foreign worker are consistent with the prevailing wage rate for the occupation and whether the working conditions meet generally accepted Canadian standards;
- (e) Whether the employer has made, or has agreed to make, reasonable efforts to hire or train Canadian citizens or permanent residents; and
- (f) Whether the employment of the foreign worker is likely to adversely affect the settlement of any labour dispute in progress or the employment of any person involved in the dispute.

## The Low Skilled Worker (Skill Levels C and D)

For many years, immigration policies in Canada focused on facilitating the entry of high-skilled workers into the country. In somewhat of a break with the past, Service Canada, in partnership with Citizenship and Immigration Canada (CIC), has developed the new "Pilot Project for Occupations Requiring Lower Levels of Formal Training" otherwise known as the "Low-Skilled Pilot

Project". The project was introduced in response to the difficulty many Canadian employers were having in filling lower skilled positions, truck drivers and seasonal employees being two of the most common examples. Under this program, a foreign worker can gain entry to work in Canada for a maximum period of 24 months (prior to February 23, 2007 the duration was one year). After this time the foreign worker must return to their country of permanent residence for a minimum of 4 months in order to be eligible to apply for a new work permit. A high school diploma or two years of job-specific training is required under the program.

Under this program an LMO application will be assessed against the criteria below. The criteria are more extensive and impose more burdens on the employer as compared to the skilled worker requirements mentioned above. These requirements can be found on the HRSDC website.<sup>2</sup> The employer must:

- a) Demonstrate comprehensive and on-going efforts to recruit Canadian youth, Aboriginal people, recent immigrants and Canadians in areas of high unemployment;
- b) Show efforts to hire unemployed Canadians through HRSDC and provincial employment programs;
- c) Consult with the local union if the position is covered under a collective agreement;
- d) Sign an employment contract outlining wages, duties, and conditions related to the transportation, accommodation, health and occupational safety of the foreign worker;

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<sup>2</sup> For more information go to HRSDC website *Pilot Project for Occupations Requiring Lower Levels of Formal Training*. Available online: [http://www.hrsdc.gc.ca/en/workplaceskills/foreign\\_workers/lowskill.shtml](http://www.hrsdc.gc.ca/en/workplaceskills/foreign_workers/lowskill.shtml) (Accessed August 21, 2008)

- e) Cover all recruitment costs related to hiring the foreign worker;
- f) Help the worker find suitable, affordable accommodation;
- g) Pay full transportation costs for the foreign worker to and from his/her home country;
- h) Provide medical coverage until the worker is eligible for provincial health insurance coverage;
- i) Register the worker under the appropriate provincial workers' compensation and/or workplace safety insurance plans; and
- j) Indicate on the contract (when an offer of employment is for longer than 12 months) that wages will be reviewed and adjusted as necessary at the end of the year to ensure prevailing wage rates are being respected.

## Occupation Under Pressure?

Bill C-50 amendments mean that the government can identify priority occupations and create programs targeting those occupations to ensure labour market needs are being met. One example is Service Canada's "Regional Occupations Under Pressure Lists." Each province's list sets out occupations for which there are recognized labour shortages. Employers wishing to hire temporary foreign workers for occupations that appear on these lists will only be required to conduct minimum advertising efforts, rather than the more comprehensive recruitment efforts normally required. Recruitment obligations will be satisfied upon advertising on the Government of Canada's National Job Bank for a minimum of 7 calendar days and/or demonstrating that ongoing recruitment mechanisms are already in place. The occupations vary by province, however, health care and the skilled trades (bricklayers, carpenters, electricians) are two of the main industries.

## Top Ten Tips for Success at the LMO Stage

Preparation of the LMO application is labour intensive. HR managers should employ the following 10 tips to ensure applications are optimally positioned for a positive outcome.

1. Identify the specific NOC for your position. The NOC has an extensive list of classifications and sub classifications all of which are accessible through a handy search engine. Simply type in the key words for your job type and the system will retrieve all occupations containing those words as well as the corollary 4-digit code. If the specific task for which you are hiring is not identified under the NOC, choose one that is most consistent with the type of occupation being offered.
2. Be clear on skill level. Because the issues to be addressed in the LMO vary based on whether the position is skilled or low skilled, you need to have a good handle on which category in the matrix (O,A,B,C or D) your job falls under.
3. Propose a fair wage. The employer must pay the prevailing wage rate for the occupation and the region in which the worker will work. For average wages according to job title and region go to Service Canada's Labour Market Information website at <http://www.labourmarketinformation.ca>. The wage must also be stated accurately. Service Canada may ask for a copy of the T4 when there is an application to renew an LMO and if the remuneration on the T4 is different from that indicated in the initial application an extension will be denied. Wages cannot be contingent upon contracts obtained after the worker arrives in Canada. The salary must be guaranteed.
4. Show proof of recruitment. For the majority of occupations the employer must show that reasonable efforts

have been made to hire Canadians. This can be done by submitting job postings as well as resumes received and by providing explanations as to why applicants were unsuccessful in the recruitment process. When it comes to advertising, provide appropriate proof. For example, use trade publications and industry or geographically specific newspapers.

5. Always include an employment contract. This adds legitimacy to the LMO application. It assures immigration officials that there is a defined vacancy that needs to be filled.
6. Make no misrepresentations whatsoever. Any dishonesty or even exaggeration can not only discredit the entire application, but may also prejudice future applications. Common areas of misrepresentation are job creation and training. If there really is no concrete evidence or likelihood that new jobs will be created by the employment of the foreign worker then it is advisable not to make such an allegation in your LMO application. Likewise, if you do not intend to provide any training then do not indicate you will do so on the application.
7. Ensure your LMO application is complete. Don't submit before double-checking that all the required pages are signed.
8. Mail the LMO. Although Service Canada allows you to file online or fax, it is preferable to file by mail because the application cannot be processed until an original signature has been provided. Consideration of the online or faxed application will be postponed until an original signature arrives by mail. Moreover, because these applications can be lengthy, faxed pages may get lost in the shuffle.

9. For unionized positions Service Canada will be looking to ensure that there are no labour disputes going on at the time of the application. If there are disputes Service Canada will want an explanation of how the hiring of the worker will impact the dispute. Service Canada will also want to see proof that the union has been consulted on the potential hire of a foreign worker. A letter of support from the union is therefore advisable.
10. Verify that the information is true. The employer must declare that all the information on the application is true and accurate. Even where a representative third party (lawyer or immigration service) was largely responsible for putting together the application, legal responsibility lies with the employer to ensure that the application contains no false information.

Service Canada will review the LMO application and provide either a positive or negative opinion. The assessment will be sent to the employer and the employer will inform the foreign applicant of the results. After a positive LMO has been rendered, the foreign worker will apply to CIC for a work permit. The work permit application must provide a copy of the Service Canada letter confirming that a positive LMO has been issued. Periods for the LMO process can vary considerably from jurisdiction to jurisdiction. Depending on the jurisdiction for which you are applying, the LMO process could take anywhere from between 2 – 25 weeks.

## **Are You Exempt From the LMO Requirement?**

The LMO process can be cumbersome, lengthy, and the risk of refusal is high. It is best avoided if possible. There are several available exemptions from the LMO requirement and the circumstances of your hire may qualify you for an exemption. The basic principle guiding LMO exemptions is that an exemption should be provided where there is a neutral or positive impact on the



labour market. The onus is on the employer to establish that the worker is exempt.

The following workers can generally bypass the LMO requirement and apply directly to CIC for a work permit:

- workers covered under international agreements like NAFTA, CCFTA and GATS (these are usually professionals, traders, investors and business people. There are also some agreements between particular countries concerning specific occupations like airline personnel, artists etc.)
- entrepreneurs/self employed persons and intra-company transferees (workers seen as providing a significant benefit to the Canadian labour market)
- emergency repair personnel
- participants in exchange programs
- spouses or common law partners of skilled workers or foreign students
- academics and students
- charitable or religious workers
- refugees (in some circumstances)

## Conclusion

Canadian employers have sent a clear message to the government - the market is

hungry for workers. The government has met this need while aiming to protect the Canadian labour market through the requirement of a positive LMO. The focus of the LMO is to ensure that workers entering Canada will not harm Canadian enterprise or competitiveness.

Given the introduction of Bill C-50, mastering the LMO application will require HR managers to pay close attention to new foreign worker programs that may be developed under the new Act. These will in turn impact the criteria for LMO applications. The tips above will assist in the completion of an effective LMO application. It is advisable in many circumstances to obtain independent advice when the case is complicated by exigent circumstances, is time sensitive or may be governed by a new pilot program. Knowing when to consult a lawyer is just as important as knowing the basics of preparing an LMO application.

Stay tuned for Part 2 of this series which will provide proven strategies for successfully acquiring a work permit and key tips for preparing workers for an admissibility interview by border officials.

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